

triable issue. It is to be noted from this affidavit that the first defendant were not quarrelling with the computation of the amount of the claim. What they were insisting upon was that the insurance claim be first settled.

Clause 4(i) of the agreement was a complete answer to this submission. In material particulars, it reads:

4(i) Any insurance moneys received shall first be applied in paying to the owner the unpaid balance of the hire-purchase price and any other sums due from the hirer under the agreement with the hirer remaining liable to pay to the owner any deficit which may remain for the loss, destruction or damage in respect of which the insurance moneys were paid ... subject as aforesaid the loss, ... destruction of or damage to the goods *shall not discharge the hirer's liability to pay all sums due under this agreement.* (emphasis mine)

Counsel for the plaintiffs submitted two authorities both of which were completely on point. In *Hire Purchase Law and Practice* by Goode, 2nd Ed, p 337 is the passage reading:

Where complete or substantial performance of the agreement becomes impossible by reason of some act or event occurring subsequent to the formation of the agreement, the supervening impossibility will in certain circumstances automatically determine the agreement and discharge the parties from further liability thereunder. Thus *in the absence of any contractual provision bearing on the point*, this result will occur where the goods are accidentally destroyed during the currency of the hire-purchase agreement without negligence on the part of the hirer or of any third party over whom the hirer can reasonably have been expected to exercise control. *But the terms of the agreement may be such as to indicate that destruction of the subject matter is not to be a frustrating event and that the hirers' obligation to redeliver is absolute.*

The second authority was *Tiong Goon Toon v Credit Leasing Corporation Sdn Bhd.*¹ There the appellant had taken a similar line. It was contended that the leasing agreements were 'frustrated' because the machinery, the subject matter of the leasing agreements, was destroyed by fire. But the agreements provided that 'in the event of any loss or damage to the equipment ... this lease agreement shall continue to have full force and effect without any amendment and in particular the rent shall continue to be payable in full'.

To my mind the effect of the agreement in this case is the same. Liability to pay the full rental continues despite damage or destruction.

Consequently there was no defence whatsoever to this claim.

I can readily appreciate the irritation of the first defendant of the manner in which they have been treated by their insurers. But there is nothing in the materials before me to indicate that Ka Yin are in any way contaminated by that conduct and consequently they must be held entitled to receive their moneys in accordance with the written agreement between them and the company.

Consequently the only decision in this case was to allow the plaintiffs' appeal with costs.

Appeal allowed.

Solicitors: Shook Lin & Bok; Yusuf Lee Pathma & Marbeck.

Reported by Ng Sheau Jiuan

C Public Prosecutor v Jul bin Alih

HIGH COURT (TAWAU) – CRIMINAL TRIAL NO 4 OF 1987
MOHAMAD NOOR J
26 AUGUST 1988

D *Criminal Law – Dangerous drugs – Trafficking in – Possession of – Accused caught red-handed with bag of cannabis – Defence of frame-up by accused's friend – Whether defence believable – Whether statutory presumptions of possession and trafficking rebutted – Dangerous Drugs Act 1952, ss 37(d), (da)(vi) & 39B(1)(a)*

E The accused was charged with trafficking in 2,709.5 gm of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The case for the prosecution was that on 25 October 1986, acting on information received, a party of plainclothes police officers laid an ambush at Jalan Haji Karim and arrested the accused who was carrying a travelling bag slung across his shoulders. The bag was examined on the spot and found to contain cannabis. In his defence, the accused deposed that he came to Sabah illegally to look for a job and by chance met S, a friend who came from the same village in the Philippines. S then asked the accused to carry a bag containing his (S's) clothing and it was this bag which the accused carried when he was arrested. The accused asserted that S had framed him up and that S was in fact the actual owner of the drugs.

Held, convicting the accused:

G (1) On the facts, it was clear that the accused was caught red-handed to have in his custody or under his control the bag which contained the drugs. As such, he was deemed to have possession of the drugs and to have known the nature of such drugs under s 37(d) of the Act until the contrary was proved. Further, having regard to the quantum, he was also presumed to be trafficking in the drugs under s 37(da)(vi), until the contrary was proved.

H (2) There was clarity and consistency in the evidence of the members of the police party. There was also no break in the chain of evidence with regard to the custody of the drug from the date of seizure until its production in court.

I (3) The court did not consider the accused's story to be reasonably true or consistent with innocence. The accused's assertion that S had framed him up is very hard to believe because if S had really wanted to frame him up, he could have used a lesser amount of drugs for the purpose, instead of the huge amount of 2,709.5 gm. Even if S was the owner of the said drugs, the accused would not be exonerated because the gravamen of the offence is against possession. Hence the accused had not rebutted the statutory presumptions on a balance of probabilities.

[Editorial Note: The accused has appealed to the Supreme Court vide Criminal Appeal No 72 of 1988.]

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da)(vi), 39B(1)(a)

Abdul Gani Patail (Deputy Public Prosecutor) for the Public Prosecutor.

Pang Shuk Ping for the accused.

Cur Adv Vult

Mohamad Noor J: The accused was charged as follows:

That you, on the 25th day of October 1986, at about 11.55 am at Jalan Haji Karim, in the district of Tawau, in the State of Sabah, on your own behalf did traffic in a dangerous drug, to wit, 2,709.5 gm of cannabis, and that you have thereby contravened the provisions of s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980), Act 234, punishable under s 39B(2) of the said Act.

This is the case for the prosecution. On 25 October 1986, at about 11.25 am acting on information received, a party of police officers in plainclothes, led by PW2, laid an ambush at Jalan Haji Karim in Tawau town near Ban Ming bread factory. At about 11.55 am, two persons amongst the crowd were seen walking towards PW2, one behind the other about a metre apart. The two persons were the accused and another man. The accused was walking behind the other man carrying a travelling bag (exh P5) slung across his shoulders. The police party closed in and PW2 identified himself as a police officer. PW4 caught hold of the accused from behind whilst PW3 handcuffed him from the front with the bag still slung on his person. The bag was examined on the spot and found to contain cannabis, the subject matter of the charge. On the facts, it is evidently clear that the accused was caught red-handed to have in his custody or under his control the bag which contained the drug. That being the case, by reason of the provisions of s 37(d) of the Act he shall be deemed to have in his possession the drug and to have known the nature of such drug, until the contrary is proved. Further, having regard to the quantum, by reason of the provisions of s 37(da)(vi) of the Act he shall be presumed, until the contrary is proved, to be trafficking in the said drug. In fact, the act of carrying itself comes within the definition of 'trafficking' in s 2 of the Act.

There was clarity and consistency in the evidence of the members of the police party. From their demeanour, I have no reason to doubt the truth of their testimonies. Further, I was satisfied that there was no break in the chain of evidence with regard to the custody of the drug from the date of seizure until its production in courts. Hence, I found that a prima facie case had been established against the accused and called for his defence.

The accused deposed that sometime in October 1986 he came to Sabah illegally to look for a job. He landed at

A Kg Icebox at night and stayed for five days in the house of a friend of the owner of the speed-boat by which he came. He did not go down to Tawau town because his entry into Sabah was illegal and he did not have much money. By chance, he met one Sharif Obiel in Tawau, a friend who came from the same village in the Philippines. B He agreed to go down to Tawau town with Sharif Obiel. However, Sharif Obiel did not join him, instead Sharif Obiel asked him to carry a bag which contained Sharif Obiel's clothings and he went down to town by taxi with Sharif Obiel's friend. He was arrested as soon as he stepped on the pavement after crossing the road and Sharif Obiel's friend disappeared. The bag was taken away from him by the police. In short, his defence was that he was an innocent carrier, that is to say, he had no knowledge of the drug, and that Sharif Obiel was the owner of the said drug.

Having deliberated on his entire defence, I did not consider the accused person's story to be reasonably true or consistent with his innocence. The accused struggled in order to free himself even though immediately before the arrest PW2 had identified himself as a police officer. The accused in his defence explained that he was scared when some people in plain clothes caught hold of him because he had no travelling documents. However, having regard to the following argument I do not believe him nor am I convinced of the truth of his story in relation to his conduct on that occasion. The bag was an ordinary sling travelling bag. It could be easily opened by means of a zip. This, the accused could have done whilst travelling in the taxi to town. But he did not open it because Sharif Obiel told him that it contained his clothings and he did not suspect anything. On these facts, by necessary implication, the accused had asserted that Sharif Obiel had framed him up. This is very hard to swallow because if Sharif Obiel had really wanted to frame him up why should he use such a huge amount of drug (2,709.5 gm of cannabis); he could have used a lesser amount for the purpose. Even if Sharif Obiel was the owner of the said drug, the accused would not be exonerated because the gravamen of the offence is against possession.

Hence, the accused had not rebutted the aforesaid statutory presumptions on the balance of probabilities. Therefore, the prosecution had proved its case beyond reasonable doubt and I found the accused guilty of the offence for which he was charged and convicted him. And I sentenced him to death.

The accused appeals.

I Order accordingly.

Solicitors: *Shim Fattah Pang & Co.*

Reported by *Ng Sheau Jiuan*